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The Rise of the Joint Stock Corporation: Towards Financialization or Socialization?

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Economic Determinism and the De-Politicization of Corporate Governance

The rise of the joint stock corporation has long been depicted as economically and technologically determined and not, therefore, much in need of explanation. It was, wrote BC Hunt in 1936, "the story of an economic necessity forcing its way slowly and painfully to legal recognition".[1] Or, as an international group of corporate law scholars recently put it: "the underlying uniformity of the corporate form" across jurisdictions is "induced by the economic exigencies of the large modern business enterprise".[2] Underlying this view is a particular account of history. It goes something like this. Individual proprietorships and "ordinary" partnerships based around a small number of people most of whom are actively involved in management are adequate at a certain level of technological development but become increasingly inadequate as technology advances. To gather together the resources required for large-scale, capital-intensive, technologically advanced industrial production, resort has to be had to the *economic* form of the joint stock company (JSC) which aggregates the money of large numbers of people, most of whom are inactive and uninvolved in management, and whose interest in the firm is purely financial. It follows that in many sectors JSCs are the "natural" organisational form for business and their rise to dominance technologically determined. So too, the argument runs, is the rise of the corporate *legal* form, for to facilitate the formation and operation of these JSCs an appropriate legal framework has to be provided. Ideally, JSCs need corporate legal status to give them a perpetual legal existence separate from that of their constantly changing memberships, and limited liability to attract the required amounts of capital from passive *rentier* investors who will not be actively involved in management.[3] Recognising this, most states have enacted general incorporation statutes which make these legal privileges freely available. If they hadn't, the argument runs, economic actors would have constructed a functional equivalent to the corporate

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[1] B C HUNT, THE DEVELOPMENT OF BUSINESS CORPORATION IN ENGLAND (1936), 13.

[2] REINIER KRAAKMAN, PAUL DAVIES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT, HIDEKI KANDA & EDWARD ROCK, THE ANATOMY OF CORPORATE LAW, 1, 215 (2004).

[3] The joint stock corporation is thus a combination of the joint stock company (JSC) *economic* form and corporate *legal* form. *Legally*, all firms that incorporate, whether large multinationals or small corner shops, are corporations, despite the often radical differences in their *economic* natures. In everyday usage, the term "corporation" tends to be used to refer to the large, public, incorporated joint stock companies that dominate contemporary economic life. This is how the term is used in this article. The economic and legal aspects of business organization are, of course, inextricably entwined: the economic nature of firms tends to be reflected in the legal arrangements between the members of the firm *inter se*, and between those members, the firm and outside third parties. These arrangements inevitably impact on the economic nature of the firms concerned. It is nevertheless analytically useful to distinguish the JSC as an *economic* form from the corporation as a *legal* form. Firstly, because, historically, many JSCs were unable to obtain corporate status and had to operate as unincorporated concerns. Originally, therefore, the term "JSC" referred not to the legal status of a firm but to its economic nature. And secondly, because in the business context the modern corporate legal form was designed with these JSCs in mind.

form through private action using property and contract.[4] Contrary to appearances, therefore, the creation of an appropriate legal framework for JSCs is not reliant on the *public* sphere and on state-provided, legal interventions and privileges. States have simply provided, as a matter of convenience, the kind of legal framework that private contracting parties could and would have constructed anyway. These (implausible) claims, with their denial of the indispensability of public action, underlay the nexus-of-contracts theories of the corporation which rose to prominence in the 1980s and 90s. These theories not only assert the fundamentally private and contractual nature of the corporation, but suggest that existing corporate structures and arrangements, being contract-and market-based, are *a priori* economically "efficient".[5] These efficiency claims have been reinforced by further claims about the market disciplines imposed on corporations and their managers by increasingly open, global financial markets and the existence of a "market for corporate control".

In this way it has come to be argued that it is not merely the triumph of the joint stock corporation but of the specifically *shareholder-oriented* joint stock corporation that is economically determined. Indeed, at the turn of the millennium Henry Hansmann and Reinier Kraakman, two leading American corporate law scholars, announced "the end of history for corporate law", arguing that, driven by global market forces, corporate law around the world was converging on a broadly uniform, Anglo-American, stock market-based, shareholder-oriented legal model of the corporation. The historic dispute between those favouring this model and those favouring alternative, less shareholder-oriented models had, they argued, come conclusively to an end. In a world of increasingly open and global financial markets, shareholder-oriented "British and American firms" had out-competed their less shareholder-oriented rivals, generating a growing normative consensus that "corporate managers should act exclusively in the economic interests of shareholders". The "bulk of legal development worldwide" was thus towards a "standard" shareholder-oriented model of the corporation, a development to be welcomed as "enhanc[ing] the efficiency of corporate laws and practices".[6] There are, this argument runs, certain "basic legal characteristics" which, for reasons of "economic exigency", "corporate law everywhere" has, "of necessity, [to] provide": "legal personality, limited liability, transferable shares, delegated management …and *investor ownership*", with the latter, of course, ensuring shareholder primacy.[7] From this perspective, corporate

[4] As was the case in the UK with so-called "deed of settlement" companies. On these, see RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844 (2000).
[5] See, for example, FRANK EASTERBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991). For a critique of these theories, see Paddy Ireland, Defending the Rentier: Corporate Theory and the Re-Privatization of the Public Company, in JOHN PARKINSON ET AL, THE POLITICAL ECONOMY OF THE COMPANY (2001) 142.
[6] Henry Hansmann & Reinier Kraakman, The End of History for Corporate Law, 89 GEORGETOWN LAW JOURNAL 439-68 (2001) and The End of History for Corporate Law, Harvard Law School Discussion Paper No 280 (2000), Centre for Law, Economics and Business. Hansmann and Kraakman describe the alternative models as manager-oriented, labour-oriented, state-oriented and stakeholder.
[7] KRAAKMAN ET AL, supra note 2, at 1, 215.

governance is a simple "agency problem": how do you get manager-agents to act in the interests of their shareholder/investor-owner-principals?

By asserting the fundamentally private, contractual, and market-based nature of corporations, these economically determinist accounts of historical development lend support not only to a pro-shareholder stance towards corporate governance, but to an approach which is supportive of voluntarism, private authority and (self-)regulation and hostile to public intervention.[8] Equally importantly, these accounts serve to naturalise and de-politicise the corporate form as currently constituted and to entrench, as economic common-sense, a conception of the joint stock corporation as a "naturally" shareholder-oriented, *private* enterprise. The effect is to place the corporate form largely beyond critical consideration and evaluation, let alone alteration.

This article questions these accounts, arguing that hidden behind what is dressed up as economic necessity are interests and power; and that underlying the recent attempts to assert the fundamentally private nature of the corporation and corporate governance is growing shareholder dependence on the public realm. History shows, it argues, that the construction and survival of the corporate legal form as currently constituted has been driven as much by the political power of the *rentier* class as by technological necessity and economic efficiency. As many late nineteenth and early twentieth century commentators recognised, the rise of the joint stock corporation contained within it two very different possible futures reflecting the hybrid nature of JSC shareholding with its mixing of proprietary rights with creditors' privileges: one of these futures was characterised by increasingly "financialized" production and corporations, the other by increasingly "socialized" production and corporations. Corporate governance has at different times headed in each direction: a period of financialization in the late nineteenth and early twentieth centuries was followed in the mid-twentieth centry by a period of socialization, which has in turn been followed in recent decades by another period of intense financialization. These shifts of direction, the paper argues, were driven not by efficiency considerations but by changes in the balance of economic and political power. The recent re-theorizations of the corporation and corporate governance, it suggests, represent ideological attempts to legitimate the governance practices which have emerged in recent decades, with their renewed prioritization of the *rentier* interest, by "re-privatizing" the corporation and corporate governance. This, the paper concludes is paradoxical given the ever shaper contradiction between the continuing private appropriation of corporate surpluses and growing emphasis and reliance on private regulatory authority, and the increasingly social (and transnational) character of production and increasing public interventions needed to protect *rentier* investors. In light of the economic and political problems that this "re-privatization" has brought, it suggests, we need to remind ourselves of the public foundations of private power and revisit the

[8] One of the most visibleexamples of the increasingly importance of voluntarism and private forms of regulation is provided by the rise of the corporate social responsibility (CSR) movement.

question of whether it is appropriate to regard corporations as *private* enterprises rather than *social* institutions.

The Joint Stock Company and the Corporate Legal Form

To understand the historical twists and turns we need to focus as much on the *economic*, joint stock aspects of the joint stock corporation as on its *legal* 'corporate' aspects. We need, in other words, to keep reminding ourselves that public corporations are incorporated JSCs with very particular economic as well as legal characteristics. The distinguishing features of the JSC were identified by Adam Smith when he contrasted them with the "private co-partneries" that dominated productive activity at the time he was writing.[9] The ideally-typical "private co-partnery" (or partnership) was based around a small number of closely-related individuals who were active participants in the firm. In law, this was reflected in the key principles of the law of partnership: mutual agency, joint asset ownership, and joint and several unlimited liability. These principles were considered to be consonant with the principles of morality and the market.[10]

By contrast, the ideally-typical JSC centred on a capital fund rather than particular people; it had many more members, most of whom were inactive, their interest in the firm being largely, if not wholly, financial. JSC "proprietors", Smith wrote, "seldom pretend to understand anything of the business of the company; … and give themselves no trouble about it, but receive contentedly such half yearly dividend or yearly dividend as the directors think proper to make to them".[11] As this suggests, JSCs were vehicles not only for productive activity, but for passive *rentier* investment. It followed that they were characterised by a separation of ownership and management, and by (more or less) freely transferable shares. In Smith's view, composed of inactive *rentier* shareholders and run by directors managing "other people's money", JSCs were inevitably characterised by "negligence and profusion". This led him to conclude that although they needed state-granted privileges like corporate status and limited liability to function smoothly, these "exemptions from the general law" should be granted to JSCs only in special circumstances: where the capital required was beyond the capacity of a private partnership; where the risks were unusually great; where the operations of the business could be reduced to a routine; and where there was an identifiable public benefit.[12] When JSCs did manage to acquire corporate privileges (which wasn't easy), they acquired a quasi-public character and tended to be viewed "through the prism of the large state-favoured corporation" and to be "associated with privilege and monopoly, inefficiency and 'Old Corruption'".[13]

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[9] ADAM SMITH, WEALTH OF NATIONS (1776, Liberty Fund edition, 1982, by Campbell, Skinner & Todd), Volume II, 731-758. The section on JSCs originally appeared in the 3rd edition, published in 1784. Smith seems to have drawn his picture of the JSC on the great trading companies.

[10] See, for example, JAMES TAYLOR, CREATING CAPITALISM (2006).

[11] SMITH, supra note 9, 741.

[12] SMITH, supra note 9, 757-58. By "general law" Smith seems to have meant the law of partnership with, inter alia, its joint and several unlimited liability.

[13] TAYLOR, supra note 10, 22. The same criticisms were made in the US: see Robert E Wright, Rise of the Corporation Nation, in DOUGLAS IRWIN & RICHARD SYLLA (eds), FOUNDING CHOICES:

Smith's ideas about the JSC were highly influential and continued to shape state policy in the UK well into the nineteenth century as the number of firms with larger memberships, *rentier* investors and delegated management grew. Following his lead, corporate privileges were granted only sparingly, forcing many JSCs to operate as *un*incorporated concerns. By contrast, in the US, where capital was less abundant, states were much more willing to grant corporate privileges to encourage *rentier* investment and foster development.[14] This underlay the terminological differences that emerged between the two jurisdictions. In late eighteenth and early nineteenth century Britain, some newly formed JSCs were able to acquire corporate status but many were not. As a result, when Charles Wordsworth wrote the first book on "company law" in 1836 - *The Law Relating to Railway, Bank, Insurance, Mining and Other Joint Stock Companies*, it was arranged around the *economic* organizational form of the JSC, encompassing *un*incorporated as well as incorporated JSCs.[15] The term "company law" thus emerged as an abridgment of "JSC law", meaning the law applicable to JSCs.[16] By contrast, in the US, where corporate privileges became widely available much earlier and where all kinds of firms and associations acquired them, the equivalent text, Joseph Angell & Samuel Ames', *Treatise on the Law of Private Corporations Aggregate*, published in 1832, was organized around the corporate *legal* form and did not draw a sharp line between business corporations and corporations of other sorts.[17] The UK terminology, however, reminds us of the crucial link between the joint stock company (JSC) as an *economic* form and the corporate *legal* form in the business

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AMERICAN ECONOMIC POLICY IN THE 1790S (2011) 217. In the US, however, this seems to have served as a reason not for rationing the award of corporate privileges but for making them more freely available – by, for example, passing general incorporation statutes

[14] ROBERT E WRIGHT, CORPORATION NATION (2014). In the US the relative shortage of capital led to the incorporation of many more firms, and, very soon, to the enactment of general incorporation statutes which made corporate privileges freely available.

[15] CHARLES WORDSWORTH, THE LAW RELATING TO RAILWAY, BANK INSURANCE, MINING AND OTHER JOINT STOCK COMPANIES (1ST ed., 1836; 2nd ed., 1837). References here are to the 2nd edition. At this time in the UK, corporate status and limited liability were obtainable only by Royal Charter or Special Act of Parliament. Legally speaking, JSCs which failed to acquire corporate status were mere (unincorporated) partnerships and (more or less) fully subject to the principles of the law of partnership, such as joint and several unlimited liability described in the text above. The JSCs operating in some of the sectors covered by Wordsworth (like railways) were usually incorporated; those operating in other sectors (like mining) were usually unincorporated. The distinctions between private partnerships and JSCs, and between incorporated and unincorporated JSCs was also drawn in the US: see JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP (1841) 107-108.

[16] In the UK, the early (Joint Stock) Companies Acts were clearly aimed at JSCs, not 'ordinary' partnerships and for many years, pretty much only JSCs or JSC-like firms incorporated. Indeed, from their inception, JSCs were associated with corporate status and privileges, even if not all JSCs were able to secure them. In the mid-nineteenth century, when incorporation and limited liability were made freely available, the link became even stronger, for thereafter nearly all JSCs were legally obliged to incorporate. For some years, therefore, in the business context the JSC *economic* and corporate l*egal* forms became more or less co-extensive. Only towards the end of the nineteenth century and the rise of the "private" company was this link broken. Thereafter, "company law" came to encompass not only JSCs but all *legally incorporated* firms, irrespective of their *economic* natures.

[17] JOSEPH ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (1ST ED., 1832). The introduction (v-vi) made it clear, however, that the growth of business corporations (private corporations) was one of the inspirations behind the book.

context: both company law and corporate law were essentially developed for application to JSCs (or JSC-like firms) with passive *rentier* investors, a separation of ownership and management, and so on.[18] Neither was constructed with individual proprietorships, small partnerships or wholly-owned subsidiaries in mind. As a result understanding company/corporate law requires an understanding of the economic nature of the JSCs for which they were originally designed.

The Joint Stock Company as a Type of Partnership

In empirical reality in the late eighteenth and early nineteenth centuries the line between the private partnership and the JSC was fuzzy. In both the US and the UK, many firms emerged with large memberships, a separation of ownership and management, and (more or less) freely transferable shares. But many of these firms were more like extended partnerships than fully-fledged JSCs, their shareholders often participating in governance and having more than a purely financial interest in the enterprises concerned.[19] Moreover, shares were not the liquid assets that they are today: restrictions on free transferability remained common and there were still no developed share markets.[20] These material realities were reflected in the tendency, which continued well into the nineteenth century, to regard *all* JSCs (incorporated and unincorporated) as types of partnership.[21] They were "public partnerships" – terminology which emphasized their quantitative rather than qualitative distinctiveness. It followed that in both jurisdictions JSCs tended to be seen as aggregations of individuals – as "theys" rather than "its".[22] Incorporated companies were simply the company's members merged into one legally distinct entity: "a collection of

[18] On the US, see Alfred Conard, Cook and the Corporate Shareholder: A Belated Review of William W Cook's Publications on Corporations, 93 MICHIGAN LAW REVIEW (1995) 1724.

[19] Many early JSC shareholders were local people investing to develop local infrastructures. See MARK FREEMAN, ROBIN PEARSON & JAMES TAYLOR, SHAREHOLDER DEMOCRACIES (2012); Eric Hilt, When Did Ownership Separate from Control? 68 J. ECON HIST (2008) 645. This was reflected, amongst other things, in the voting rights regimes adopted by companies at this time: see Henry Hansmann & Mariana Pargendler, The Evolution of Shareholder Voting Rights, 123 YALE LAW JOURNAL (2014) 948.

[20] See Paddy Ireland, Capitalism without the capitalist: The JSC Share and the Emergence of the Modern Doctrine of Separate Corporate Personality, 17 JOURNAL OF LEGAL HISTORY (1996) 41.

[21] In the UK, for example, see the JSCs Act 1844 (7 & 8 Vict., c.110), which refers to JSCs as types of partnership. In the US, see (inter alia) William Leggett, Joint Stock Partnership Law, EVENING POST 30/12/1834; and JOSEPH STORY, COMMENTARIES ON THE LAW OF PARTNERSHIP (1841) 107-108 (distinguishing "private partnerships" from "public companies" which could be incorporated or unincorporated, but referring to the latter as partnerships). In the US the comparatively late emergence of a developed share market – a major impediment to the development of large-scale pure *rentier*, money capitalist investment – contributed to the lingering conceptualization of corporations, even those organized on a joint stock basis, as types of partnership.

[22] On the UK, see IRELAND, supra note 20. On the US, see EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 (1954) 66; Naomi Lamoreaux, 'Partnerships, Corporations and the Limits on Contractual Freedom in US History', in KENNETH PIPARTITO & DAVID SICILIA, CONSTRUCTING CORPORATE AMERICA (2004) 29 at 44-45.

many individuals united into one body", as Kyd put it.[23] In similar vein, JSC shareholders were commonly seen and described as "partners".

This was reflected in Wordsworth's book which depicted JSCs as large partnerships, and saw them *all* as, in principle, subject to the law of partnership, incorporated companies included, notwithstanding their "confirmation by public authority".[24] In common with his contemporaries, Wordsworth tended to see companies, like ordinary or private partnerships, as essentially contractual affairs irrespective of their legal status, treating Acts of Parliament, charters from the Crown, letters patent and other instruments of incorporation as akin to deeds of settlement - as simply one of the instruments by which "the *partnership* between directors and shareholders [wa]s constituted and governed".[25] As this suggests, incorporation did not yet create an entity radically separate from its shareholders, nor provide anything resembling a fully-fledged alternative legal form for business enterprises.[26] For Wordsworth, incorporation seems merely to have partially displaced the operation of the normal principles of partnership, the degree of displacement depending upon the precise terms of and privileges granted by the instrument of incorporation. Thus, Wordsworth presented the general principles of the law of partnership, highlighting "the rights of partners or shareholders in a company between themselves" and "the mutual rights of and liabilities of shareholders and third persons", but noted the gradual emergence of rules specifically applicable to companies. He then sought to outline the derogations from these (partnership) principles in the companies (some incorporated, some unincorporated) to be found in different areas of productive activity, devoting separate chapters to railway, mining, banking, and insurance. He treated it as more or less axiomatic that joint stock companies, incorporated and *un*incorporated, were governed by the general law of partnership

[23] STEWART KYD, TREATISE ON THE LAW OF CORPORATIONS (1793) Vol I, 1, 7. See also IRELAND, supra note 20.
[24] WORDSWORTH, supra note 15, 109. Some editions of Wordsworth's book (the 3rd 1843 edition, for example) were reprinted and published in the US and cited in treatises such as Angell & Ames'.
[25] At this time, instruments of incorporation were usually bespoke documents, those sponsoring the company commonly being intimately involved in the drafting process, statutory or otherwise. When questions arose about the impact of the special powers granted to companies (of compulsory purchase, for example) on third parties, the Acts of Parliament incorporating the companies concerned were regularly treated as containing a contract between the company and affected third parties.
[26] As Samuel Williston observed, in relation to "the points which belong exclusively to the conception of the business corporation", as opposed to the conception of corporations in general, "the law [was] formed very largely after 1800": S Williston `History of the Law of Business Corporations Before 1800, 2 HARVARD LAW REVIEW (1888) 105 at 113. As James Willard Hurst observed, "public policy had as yet drawn little distinction between governmental, eleemosynary, and business corporations": THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES, 1780-1970 (1970) 7. Thus Blackstone's coverage of corporations makes no reference to business enterprises. Before 1800, most corporations were municipalities, universities and the like, and the distinction between public and business corporations had not clearly been drawn. It is striking, for example, how marginal business corporations are to Kyd's treatise; as Hurst says, he had "little to say, and scant authority to cite, concerning the use of the corporation for economic enterprise": see KYD, supra note 27; Hurst ibid, 7.

except in those important respects in which the latter had been "*superceded*" (sic) or "*limited and restrained*"' either by the granting of corporate privileges or by the judiciary.[27]

John William Smith adopted a very similar approach in his *Compendium of Mercantile Law* which appeared at around the same time. For Smith, a JSC was "a partnership consisting of a very large number of members" and the rights and liabilities of these members "would be precisely the same as those of any other sort of partner did not their multitude oblige them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called a deed of settlement to which is frequently added an act of parliament expressly for that purpose". Where a company existed under such an act it "certainly differ[ed] ... from an ordinary firm" but only to the extent provided by the act or patent; in all other respects it was "governed by the ordinary law of partnership". Joint stock companies were thus "nothing but partnerships of a peculiar kind" and the law relating to them could, therefore, be "conveniently be distributed under the same heads" as the law of partnership.[28]

The Changing Nature of the JSC and JSC Shareholding

If the US led the way in incorporations, Britain led the way in fully-fledged JSCs. The period from the 1830s saw the emergence of a growing number of ideally typical JSCs and a dramatic increase in the volume of out-and-out *rentier* shareholding. The driving force was the rise of railway companies which needed to raise enormous amounts of capital by contemporary standards – capital which in the UK was raised almost entirely privately through equity issues.[29] The result was the appearance of JSCs populated by huge numbers of shareholders, most of whom were pure *rentier* "investors" whose interest in the firm was purely financial. This generated the emergence for the first time of a relatively well-developed public market for JSC shares.[30] In the UK these changes in the character of the JSC and JSC shareholding prompted a series of changes to the law of partnership as it was applied to JSCs.[31] In 1844, incorporation by mere

[27] WORDSWORTH, supra note 18, 35, 64, 101-4. He adopted the same approach in the third edition of the book in 1842, modifying it only after the passing of the 1844 Act. It is, of course, worth noting that many of the JSCs that were granted corporate privileges by the state met Adam Smith's "general utility" (public benefit) requirement.

[28] JOHN WILLIAM SMITH, COMPENDUIM OF MERCANTILE LAW (2nd ed., 1838) 57, 68; (3rd ed., 1843) 62, 73. Multiple American editions of Smith's book were published. Similar views are found in US cases such as *Bissell v The Michigan Southern & Northern Indiana Railroad Cos* (1860) 22 N.Y. 259 (New York Court of Appeals), where Comstock C.J. asserted that "a private or trading corporation is essentially a chartered partnership, with or without immunity from personal liability beyond the capital invested, and with certain other convenient attributes which ordinary partnerships do not enjoy".

[29] On the different systems of railway finance, see Frank Dobbin, Why the Economy Reflects the Polity: Early Rail Policy in Britain, France and the United States, in GRANVETTER & SWEDBERG, THE SOCIOLOGY OF ECONOMIC LIFE (2nd ed). It was the private, equity-based nature of UK railway finance that drove the faster development of the share market in the UK. Railroad finance in the US, for example, was much more debt-based and state supported.

[30] See IRELAND, supra note 20.

[31] By the closing decades of the century the law on JSCs, previously regarded as a branch of the law of partnership, had deviated so much from the principles of partnership that "company law" had come to be seen as an autonomous legal category in its own right: see Paddy Ireland, Property and Contract in Contemporary Corporate Theory, 23 LEGAL STUDIES (2003) 453.

registration was made available, followed in 1855 by the introduction of general limited liability. The effect of these legislative changes on the perceived nature of the incorporated JSC was considerable, for they turned what had once clearly been seen as legal *privileges* to be granted only where there were clear *public* benefits (such as developing the national economic infrastructure) into *private rights*.[32] A series of judicial changes were also made to the law of partnership as it applied to JSCs: the partnership doctrine of mutual agency was abandoned, the doctrine of ultra vires was reformulated, and so on. The cumulative effect was to accommodate and offer protection to the growing (though still relatively small) class of *rentier* shareholders. In Robert Flannigan's words, a "sustained effort" was made "to design ... arrangements that exposed passive investors to something less than the general liability of principals".[33]

Crucially, as part of these processes, JSC shares were judicially re-conceptualised as rights to profit - a new form of intangible personal property quite separate from the assets of the company. This was a very significant change. Originally, shares in all JSCs, incorporated and unincorporated, were regarded as equitable interests in the company's assets and shareholders regarded, like partners, as having a direct proprietary interest in the firm's property.[34] In *Bligh v Brent* in 1837, however, the property of the shareholders was conceptualised as money not assets, and the shareholders portrayed, like creditors and unlike partners, as *transferring* ownership of this money to the company.[35] The assets acquired by the company were then conceptualised as being owned, legally and equitably, by the company as a separate entity. Shareholders owned mere rights to "surplus profit" - personal property, irrespective of the nature of the company's assets.[36] The same reasoning was soon applied to shares and shareholding in *un*incorporated JSCs on the grounds that their *economic* natures were the same as in incorporated companies.[37]

The effects were paradoxical. On the one hand, disconnected from assets, JSC shares began to look less like the rights *in rem* of partners – "insiders" who retain ownership

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[32] Significantly, the pressure for limited liability in the UK came much more from financial interests than from industry, which was generally opposed to its introduction: See Paddy Ireland, Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility 34 CAMBRIDGE JOURNAL OF ECONOMICS (2008) 837.

[33] Robert Flannigan, The Political Imposture of Passive Capital, 9 JOURNAL OF CORPORATE LAW STUDIES (2009) 139 at 146-47."The law of business corporations", argue Kraakman et al, "is principally designed to facilitate the organization of investor-owned firms"; the governance structure of corporate law, which is aimed at dealing with "the basic agency problem between the firm's owners and its managers … is designed principally to effectuate the interests of shareholders as a class", supra note 3, 33.

[34] Shares are, of course, still referred to as "equity".

[35] This was crucial because it turned shareholders, at least in part, into lenders and, therefore, creditors, external to "the (asset-owning) company" – though, of course, they at the same time retained certain key proprietorial rights such as voting rights.

[36] *Bligh v Brent* (1837) 2 Y & C 268. In the 3rd edition of their treatise Angell & Ames opened the chapter on 'the nature and transfer of stock in joint stock incorporated companies' with an analysis of *Bligh v Brent* (1846, chapter XVI, 499).

[37] See IRELAND, supra note 20, 57-8.

of a firm's assets and continue to carry the responsibilities and liabilities that go with this - and more like the rights *in personam* of creditors – "outsiders" who transfer ownership of their assets and cede responsibility and liability in return for regular money payments and a bundle of contractual rights.[38] On the other hand, the disconnection of shares from assets (including any real estate owned by the company), together with the development of the market for shares, enhanced their transferability.[39] The result was that that although they were now intangible and more contractual in nature, they had also become more exchangeable and more thing- and property-like. There were now two quite different bits of property: the assets owned by the company and the shares owned by the shareholders.[40] This enabled JSCs, incorporated and unincorporated, to acquire, in a much fuller sense than before, an existence as asset-owning legal persons quite separate from that of their share-owning shareholders.[41] One manifestation of this was a subtle change in the wording of the UK Companies Acts. The Joint Stock Companies Act 1856 permitted seven or more persons to "form *themselves"* into an incorporated company, clearly implying that the company was made *of* them. By contrast, the Companies Act 1862 permitted seven or more persons to "form a company'" implying that the company was an object external to them, a "thing" made *by*, but not *of*, them.[42]

The re-conceptualisation of the JSC share marked an important step in the processes whereby shareholders were conceptualised as (passive) "investors" rather than (active) "partners". Although for many years policymakers nevertheless continued to assume (or hope) that shareholders would, at least to some extent, act like "owners" (rather than creditors) and monitor managers – a hope which persists to this day - gradually the rights and powers traditionally associated with 'ownership' were delegated to directors.[43] Shareholders retained their residual control rights, however,

[38] Relating mainly to dividends, winding up and voting. Like contractual rights, they are primarily determined by the terms of the share issue and by the company's constitution, though some are conferred by statute: See Sarah Worthington, Shares and Shareholders: Property, Power and Entitlements: Part 1, 22 COMPANY LAWYER (2001), 258.

[39] So too did the provisions of the 1844 Act, which declared shares of registered companies to be personal property and transferable as such. However, under the Act 1844 the liabilities of former shareholders did not terminate on transfer, continuing in certain circumstances for a further three years: see s66.

[40] No longer conceptualized as interests in the assets of the company but as revenue rights, shares became a form of what Marx called "fictitious capital".

[41] Some degree of separation of firms and their members had been made possible by the process of "affirmative asset partitioning" whereby the property of firms, whether corporations or partnerships, had come to be treated as constituting a separate estate shielded to some degree from the creditors of their members as individuals. The ability of firms to become separate entities even in this limited sense, however, was and is limited wherever the firm's creditors are not confined to the members' property but can go beyond it to reach the members themselves: see S J STOLJAR, GROUPS AND ENTITIES (1973), 79-87.

[42] See IRELAND, supra note 31.

[43] See FREEMAN ET AL, supra note 19, especially chaps 4 & 5; Paddy Ireland, Company Law and the Myth of Shareholder Ownership 62 MODERN LAW REVIEW (1999), 32. *The Times* picked up on this as early as 1840, remarking that companies had become "means of making money" not only "in idleness" but "in compulsory idleness". *Times* 9/10/1840

so even if they couldn't direct directors they could still dismiss them. They also, of course, now benefitted from the privilege of limited liability.[44] The significance of this grew in the final decades of the century. Hitherto shares were generally of high denomination but only partly paid up. As a result, shareholders had residual liabilities to companies, albeit limited to any unpaid amounts on their shares (hence "limited liability"). The uncalled capital provided companies with a source of additional finance and acted as a comfort to creditors, but it also meant that links remained not only between shareholders and companies, but, indirectly, between shareholders and the company's creditors: if a company's assets were insufficient to meet the claims of creditors, the company could try to meet those claims by levying a call on its shares to recover any unpaid sums on those shares from shareholders. By the turn of the century, however, the links forged by these residual liabilities had all but been severed as share denominations fell and shares became fully paid-up, a process facilitated by the courts and legislature.[45] By 1885 only about 32% of companies outside the banking, insurance and finance sectors had shares that weren't fully paid up; by 1913 this had fallen to just 5.4%.[46] The result was that the *de jure* regime of limited liability became a *de facto* regime of no-liability. Shareholders really did now benefit from what Adam Smith had called a "total exemption from trouble and from risk": all they stood to lose was the money spent on their shares.[47] Indeed, by the 1870s wealthier shareholders were beginning to delegate not only management of companies but management of their money to institutions, diversifying their holdings and spreading their risks.[48]

By eliminating the remaining liability links between companies and shareholders, the rise of the fully paid-up share paved the way for the emergence of the modern doctrine of separate corporate personality with its "complete separation" of companies and shareholders. Corporate shareholding had now come to comprise ownership of an unencumbered, free-standing right to revenue, entailing no responsibilities or liabilities, contractual or otherwise, to the company or third parties. Shareholders had, however, retained their residual control rights over this reified and de-personified legal entity, and this underpinned the emergence of the idea that the company/corporation

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[44] Although the 1844 JSCs Act placed management firmly in the hands of directors, the right of shareholders to elect directors was explicit: 7 & 8 Vict, c 110, s26. Significantly, the advocates of limited liability sought not general limited liability but the introduction of something resembling the French *société en commandite,* a limited partnership in which passivity was a pre-requisite of acquiring and retaining the privilege of limited liability.: see Francis Troubat, *The Law of Commandatary and Limited Partnership*s (Philadaelphia, Kay, 1853). For *rentier* investors in these firms, therefore, limited liability and control rights were decoupled.
[45] Legislatures took steps to facilitate capital reductions, and courts accepted ever more varied ways (other than handing over cash) of paying for shares.
[46] See Acheson, Turner & Ye, The character and denomination of shares in the Victorian equity market, 65 ECONOMIC HISTORY REVIEW (2012) 862. Disappearing residual shareholder liabilities were attributable "mainly to demand-side pressures from investors", the growing and increasingly prosperous middle classes demanding "safe equity", and a "diversified portfolio of readily marketable stocks".
[47] See IRELAND, supra note 32.
[48] See ARTHUR SCRATCHLEY, ON AVERAGE INVESTMENT TRUSTS (1875).

was an object of property that they “owned”.[49] Shareholders had gone from *being* the company/corporation to *owning* it. They had become both “insiders” with residual proprietary rights able to elect and dismiss directors and insist that “the company” be run in their exclusive interests; and “outsiders” who, like creditors (and unlike partners), had transferred ownership of their property to a separate legal person and become responsibility- and liability-free. [50]

The peculiar nature of corporate shareholding is reflected in the difficulties lawyers have capturing the legal nature of the share. One of the most oft-cited definitions in the UK, that provided by Farwell J in *Borland's Trustee v Steel Bros & Co Ltd,* seeks to encompass both the proprietary and contractual dimensions of shares. According to Farwell, the share is “the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders *inter se* … [It] is an interest measured by a sum of money and made up of various rights contained in the contract, including the right to a sum of money of a more or less amount”.[51] Some have used this to foreground the contractual dimensions (“liability”, “covenants”) of shares while noting their proprietary dimension (“interest”).[52] Others, struggling with the same problem, have placed much greater emphasis on the proprietary qualities of shares.[53] Ultimately though, as many commentators have recognized, the rigid *theoretical* separation between shareholders (with rights in the company as well as against it) and debenture-holders (with rights against the company but never in the company itself) collapses in contemporary economic reality.[54] Moreover, the JSC share’s mixing of insider and outsider rights, of proprietary rights with creditors privileges, lies at the heart of contemporary corporate dysfunctionality and irresponsibility, for it gives shareholders residual control rights which enable them to insist, as “owners”, on “shareholder value maximization” without having to worry about how the revenues and capital gains are generated, because, like creditors, they aren’t legally liable for corporate debts or wrongs. As Harry Glasbeek has observed, corporate shareholders “have little financial incentive to ensure that the managers involved behave legally, ethically, or decently’, because in law, they are ‘personally

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[49] This idea was strengthened by the retention by shareholders of the “residuary right in the things owned”, the possessor of which tends to be seen as the “owner”: see A M Honoré, Ownership, in A G GUEST (ed), OXFORD ESSAYS IN JURISPRUDENCE (1961) 107.
[50] In Robert Flanagan’s words, shareholders had acquired a ”novel status”: Flannigan, Shareholder Fiduciary Accountability [2014] JOURNAL OF BUSINESS LAW, 1 at 6.
[51] [1901] 1 Ch 279 at 288.
[52] See, for example, ROBERT PENNINGTON, COMPANY LAW (7th ed., 1995), 56-57, 135-36; Robert Pennington, `Can Shares in Companies be Defined?' (1989) 10 COMPANY LAWYER 144.
[53] See, for example, L C B Gower, PRINCIPLES OF MODERN COMPANY LAW (4th ed 1979), 299-301, 400.
[54]See, for example, Gower, supra note 53, 299-301, 321; L.S. SEALY, CASES AND MATERIALS IN MODERN COMPANY LAW (6th ed 1996), 420-421. Legally, Robert Flannigan suggests, the debt-equity distinction is rooted in liability questions, though the “default financial position of shareholders is similar to that of debt holders: both have capped exposures that prevent recourse to other personal assets”: Flannigan, The Debt-Equity Distinction (2011) 26 *BFLR*, 451 at 454; Shareholder Fiduciary Accountability [2014] *JBL*, 1 at 10.

untouchable."[55] This has, of course, been only too evident in a range of recent corporate scandals and crises.

The Joint Stock Company: Towards Financialization or Socialization?

It was quickly recognized that the rise of the joint stock corporation was altering the nature of capitalism. However, commentators of various colours and persuasions detected in the 'corporate revolution' two very different possible futures. The first, rooted in the residual proprietary rights of shareholders, envisaged the emergence of increasingly "financialized" corporations and an increasingly "financialized" capitalism. The second, rooted in the increasingly creditor-like nature of shareholding and increasingly social character of production, envisaged increasingly "socialized" corporations and an increasingly "socialized" capitalism. These alternative visions have informed and shaped the debates about corporate governance and, indeed, have appeared at different times to be in the process of realization.

Both, for example, figured in Marx's analysis of the rise of the JSC. On the one hand, he saw it as a "progressive" development which marked the beginning of the supersession of the means of production as private property. The capital invested in JSCs, he argued, was "directly endowed with the form of social capital (capital of directly associated individuals) as distinct from private capital". JSCs thus assumed "the form of social undertakings as distinct from private undertakings"; individual private property was being replaced by a kind of "socialized" property. Echoing Smith, Marx also observed that in JSCs the "actually functioning capitalist" was transformed into "a mere manager, administrator of other people's capital", while the "owner of capital" was transformed into "a mere money capitalist". JSC shareholders received their reward in the form of interest, "that is, as mere compensation for owning capital that now is entirely divorced from function in the actual process of production". Implicitly recognizing the diminution of the shareholder to something resembling a creditor, Marx argued that the rise of the JSC represented the "abolition of capital as private property within the framework of capitalist production itself", the "latent abolition of capitalist property"; it entailed "private production without the control of private property".[56]

Although for Marx the rise of the JSC epitomized the increasingly socialized character of production, however, corporate surpluses continued to be appropriated privately. In his view, therefore, the JSC also highlighted the "contradiction between the general social power into which capital develops … and the private power of the individual capitalist". Crucially, he argued, as management was handed over to "functionaries" and "owners" were rendered functionless, there was no reason why management functions couldn't be delegated to workers. This led him explicitly to link the growing number of JSCs to the rise of the co-operative movement and to suggest that both

[55] HARRY GLASBEEK, WEALTH BY STEALTH (2002), 129.
[56] KARL MARX, CAPITAL VOL III (1894, Lawrence & Wishart ed., 1959), 436-438.

were "transitional forms" in the shift from capitalism to socialism in which capital would be "reconverted" into the property of associated producers, "outright social property". "The capitalist stock companies", he wrote, "as much as the co-operative factories, should be considered as transitional forms from the capitalist mode of production to the associated one, with the only distinction that the antagonism is resolved negatively in the one and positively in the other". For Marx, although "the antithesis between capital and labor" in co-operatives was only overcome "by way of making the associated laborers into their own capitalist, i.e. by making them use the means of production for the employment of their own labor", they nevertheless showed "how a new mode of production naturally grows out of an old one".[57]

On the other hand, Marx recognized that one of the immediate effects of the development of the credit system had been to combine small amounts of money into large agglomerations of money concentrated in banks which acted as "the general managers of money-capital", the "representatives of social capital", of "capital in general". This, he observed, had created a "money power", a "financial oligarchy", a "new financial aristocracy". In the context of the JSC he went even further, arguing that its rise had generated "gambling on the stock exchange" and been accompanied by the development of a "whole system of swindling and cheating" in the shape of promoters, speculators and directors - a "new variety of parasites", centring on "corporation promotion, stock issuance, and stock speculation". Moreover, the "enormous centralization" of the credit system had given to "this class of parasites the fabulous power not only to periodically despoil industrial capitalists, but also to interfere in production in a most dangerous manner".[58] For Marx, then, while the rise of the credit system and the joint stock corporation had set us on a road whose endpoint he expected to be "socialization", the immediate effect had been productively dysfunctional "financialization".

Which, if either, of these two possible futures – one of increasing "financialization", already visible and present; another of increasing "socialization", present in a distorted form but as yet still largely latent – would materialize? Was the rise of the corporate economy paving the way for domination by a "new financial aristocracy" or, as Marx suggested, paving the way for a transition to socialism? Over the course of the next century and a half the double edged nature of the "corporate revolution" repeatedly surfaced, finding vivid expression in the debates about the nature of the corporation.

Financialization in the Ascendancy

In the decades after Marx's death, the number of joint stock corporations grew, partly because of new technologies which demanded large-scale production but mainly because of the desire of firms to suppress destructive overproduction and price-cutting competition. The decades around the turn of the century saw the formation of numerous trusts (US), cartels (Germany) and Trade Associations (UK) aimed at fixing

[57] MARX, supra note 56, 439-441

[58] MARX, supra note 56, 402-403; DAVID HARVEY, LIMITS TO CAPITAL (1982), 287.

prices and output. When these arrangements broke down, as they generally did, they were followed by mergers which created large industry-dominating joint stock corporations. By 1914, these corporations had come to dominate many key industries; in the inter-war years they came to dominate many more. The rise of the corporate economy was thus driven as much by market subversion as by market-driven economic "efficiency".

Financial institutions dominated many of the joint stock corporations which emerged, and by the turn of the century the growing power of "high finance" was clear for all to see, especially in the US and Germany, where large swathes of industry were under the control of banks and financiers. This was the period of "the first financial hegemony".[59] In the US financiers like J P Morgan led the way, using a mixture of voting trusts, debt and interlocking directorates to exercise *de facto* control over more and more corporations. Indeed, the growing domination of this plutocratic financial elite (the so-called "money trust") prompted the Pujo Committee investigations of 1912-13.[60] In Germany banks led the way, prompting Rudolf Hilferding to develop his theory of "finance capital". Elaborating and building upon Marx's sketch of 'the economics of the corporation', Hilferding analyzed the implications of what he saw as the growing domination of German industry by a small number of banks and the fusion of industrial and financial capital. While recognizing the growing power and influence of high finance, however, Hilferding was one of a number of commentators who saw the rise of the JSC as helping to "socialize production".[61] Firstly, the sheer size and market power of these joint stock corporations endowed their activities, individually and collectively, with social significance, making it increasingly difficult to characterize them as purely "private" enterprises. Secondly, their rise was leading to production co-ordinated more by corporate planning than free markets, a development which led later to the emergence of ideas about "organized" and "monopoly capitalism".[62] Finally, of course, the corporation had undermined traditional notions of private property in the productive sphere. The tangible productive assets of industry were now increasingly owned by separate corporate entities and managed by professional managers, with most shareholders reduced to the status of passive and functionless holders of income rights: shares, Hilferding wrote, represented a "creditor's claims on future production". The rise of the JSC and "finance capital", he concluded, was establishing "socialize[d] production to the extent that this [was] possible under capitalism". The problem was that the JSC and finance capital represented an "antagonistic" or "fraudulent form of socialization modified to suit the needs of capitalism", in which "the control of social production remain[ed] vested in an oligarchy". He nevertheless saw their rise as progressive, for it "facilitate[d] enormously the task of overcoming capitalism": by

[59] GERARD DUMENIL & DOMINQUE LEVY, THE CRISIS OF NEOLIBERALISM (2011)
[60] See also LOUIS BRANDEIS, OTHER PEOPLE'S MONEY (1912).
[61] RUDOLF HILFERDING, FINANCE CAPITAL (1909, Routledge edition, 2007).
[62] The term "organized capitalism" was first coined by Hilferding; the term "monopoly capitalism" is associated with the work of Paul Baran and Paul Sweezy. For a brief discussion, see JOHN SCOTT, CORPORATE BUSINESS AND CAPITALIST CLASSES (OUP, 1997), 13-14, 24-25.

taking possession of six large Berlin banks you could take control of the most important spheres of industry. The key was "the struggle to dispossess this oligarchy".[63]

Although written in a different idiom, similar themes ran through the work of other commentators. For example, in *Drift and Mastery,* published in 1914, the American journalist Walter Lippmann argued that technological advances and the rise of the professionally managed corporation was "sucking the life out of private property". Emphasizing the creditor-like nature of corporate shareholding, Lippmann argued that "the modern shareholder" was a "very feeble representative of the institution of private property", having no productive role to play and no responsibilities to discharge: the "one qualification" was the "possession of some money and the desire for more". Shares were now "little more than claims to residual profits", and shareholders "transient" "absentee owners", who flitted "like … butterfl[ies] from industry to industry" with their liquid, mobile capital. "Deprived of their property rights", they were "being transformed into money lenders" with "a single motive" from whom it was unrealistic to expect a "high sense of social responsibility". For Lippmann, however, socialization was already becoming a reality. There had, he argued, been a discernible "change in business motives" and a "revolution in business incentives". Business and management were becoming "professions" akin to medicine, law and engineering in which "motives other than profit came into play". It was true that "control ha[d] passed *for the time being* into the hands of investment experts, the banking interests", but that control was already being challenged—not by the "decadent stockholders" but by "those most interested in the methods of industry: the consumer, the worker and the citizen at large".[64]

Not everyone was as confident. The American economist and sociologist Thorstein Veblen could see the progressive potential of the large corporation but was much less sure it would be realised. "Machine industry" and modern technology, he argued, demanded genuine "social ownership" and rendered the idea of individual property rights in the means of production hopelessly outdated. But while the rise of the joint stock corporation had facilitated large-scale production and the exploitation of the "industrial arts", it had also seen "*industry*", the technical processes concerned with the efficient production of useful goods, fall under the control of "*business*" – by which Veblen meant financial interests more concerned with making money than things. The result was that industrial processes were being managed not to maximize productive efficiency and output, but to secure pecuniary gains for the owners of financial property.[65] "The financial community", Veblen argued, had taken over ownership of the country's largest corporations and thereby gained control of "the usufruct of [its] industrial system".[66] This operated against the best interests of the community which

[63] HILFERDING SUPRA NOTE 61, 110, 367-8. In the 1920s, Hilferding served on the German "socialization" commission and developed a concept of what he called "organized capitalism".
[64] WALTER LIPPMANN, DRIFT AND MASTERY (1914, 1985 edition)
[65] THORSTEN VEBLEN, THEORY OF BUSINESS ENTERPRISE (1904), 77–8, 80.
[66] THORSTEN VEBLEN, ABSENTEE OWNERSHIP (1923), 231-2.

lay in the “efficient management” of industrial enterprises and “unhampered working out of the industrial system”.[67] Indeed, financial domination often led to the “conscientious sabotage” of industry, with larger profits to be had from financial manipulation and the obstruction of production than from its facilitation. This led him to conclude that “business” had become a parasitic growth on industry and the investment bankers and corporate financiers had become restrictive of further economic development. Having little faith in class struggle as a way of realizing the possibilities inherent in modern industry and technology, Veblen struggled to see how these vested financial interests might be overcome.

Towards Socialisation?

By the late 1920s, however, Veblen’s pessimistic vision was beginning to seem at odds with the economic trajectory of American society. During the course of the decade, equity ownership by individuals increased and became more dispersed and the exercise of direct control by investment bank(er)s receded.[68] “The great mass” of American industry, Robert S Brookings argued in 1925, had been “almost unconsciously converted from a management based on an intensely personal ownership to a management based on an ownership widely distributed and therefore almost entirely impersonal”.[69] The small investor found it “practically impossible ... to keep in touch with, and exercise any intelligent control over, management”. At the same time, the direct forms of financial control exercised by Morgan and his like were gradually being replaced by more impersonal, bureaucratic forms of institutional share ownership. According to Veblen, this marked the emergence of a “new order” of “absentee ownership”.[70] It also marked the beginning of a waning in financial power. Although investment banks continued to prosper, promoting mergers and combinations and using holding companies to carry pyramiding to new extremes, it was their “last hurrah”. The shattering effects of the crash and subsequent depression further weakened them. With corporate self-financing also increasing, there was a further shift of “bargaining strength … from the bankers in favor of the corporations”.[71] Management, the contemporary business commentator Mary Follett wrote, “not bankers, nor stockholders” was becoming “the fundamental element in industry”.[72] The journalist Lincoln Steffens agreed, writing in 1931 that “financial sovereignty” was “passing from the banks to the management of industry—the management, not the

[67] VEBLEN, *supra* n 65, 78; THORSTEN VEBLEN, THE VESTED INTERESTS AND THE COMMON MAN (1919), 93.

[68] William Z Ripley reported that there were only 4.4m shareholders in the US in 1900, but 14.4m by 1923: RIPLEY, MAIN STREET AND WALL STREET (1927).

[69] ROBERT BROOKINGS, INDUSTRIAL OWNERSHIP: ITS ECONOMIC AND SOCIAL SIGNIFICANCE (1925), viii.

[70] VEBLEN, supra note 66.

[71] Paul Sweezy, Investment Banking Revisited (1982), 33 MONTHLY REVIEW (no 10), 1 at 9. see also Sweezy, The Decline of the Investment Banker, ANTIOCH REVIEW, Spring 1941, reprinted in SWEEZY, THE PRESENT AS HISTORY (1953), 191 at 193.

[72] Mary Follett, How must business management develop in order to possess the fundamentals of a profession? in HENRY METCALF (ed), BUSINESS MANAGEMENT AS A PROFESSION (1927) 78.

ownership".[73] Berle and Means were, of course, shortly to add empirical weight to this idea.[74]

As more and more commentators began to echo Lippmann's claim that management was becoming a "profession", the belief grew that corporations were being "socialized". In Britain, by the mid-1920s Keynes was arguing that there was an inevitable tendency for "joint stock institutions, when they [had] reached a certain age and size, to approximate to the status of public corporations rather than that of individualistic private enterprise". The "tendency of big enterprise to socialize itself", he suggested, arose when "the owners of the capital, i.e. shareholders, are almost entirely disassociated from the management". At this point managers became more concerned with stability and reputation than with profit maximization, and shareholders had to satisfy themselves with "conventionally adequate dividends".[75] In the US at around the same time, Robert Brookings similarly argued that while the "internal pressure from the stockholders [on managers] had decreased", the "external pressures" on them from trades unions, politicians and the public had increased, creating new trends and objectives in corporate management. "The more completely management [was] separated from ownership", he argued, "the more it comes to be regarded as the representative of all the cooperating parties and conflicting interests, and not simply of stockholders". With stockholders "as a rule content with a reasonable return", management was coming to "occupy the position of trustee".[76] These arguments were echoed by Merrick Dodd in his celebrated debate with Adolf Berle. Responding to Berle's defense of shareholder primacy, Dodd observed that the great majority of the shareholders in large joint stock corporations were *rentiers* with little resemblance to traditional owners, and argued that corporations should be seen as s*ocial* institutions rather than private enterprises, and directors required to take account of the interests not merely of shareholders but of employees, consumers, creditors and society as a whole. Indeed, Dodd argued, this was already happening. "Public opinion" was making "substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as profit-making function". Corporate managers such as Owen D Young and Gerard Swope of the General Electric Company, he argued, recognized that managers were "no longer attorneys for stockholders" but "trustees of an institution" who owed obligations to employees, customers and the general public as well as to shareholders: their job was "to administer wisely and fairly in the interest of all". Dodd added that this "socialization" of the corporation was perfectly

[73] LINCOLN STEFFENS, AUTOBIOGRAPHY (1931), 869.
[74] "The relative abundance of capital, coupled with the rise of new investment houses, the growth of direct investments, and the ability of large corporations to finance their own expansion from corporate surpluses, … undercut the finance capitalists, shifted power to a new managerial elite, and produced situations where the industrialist rather than the banker could call the tune": ELLIS HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966), 305.
[75] J M KEYNES, END OF LAISSEZ-FAIRE (1926)
[76] BROOKINGS, supra note 69, 21-25, 76. According to Brookings, stockholders were "as a rule content with a reasonable but reliable return".

defensible if you took seriously the existence of the corporation as a genuinely separate legal person with interests of its own.[77].

Some were content to allow socialization to continue to develop informally within existing corporate legal structures. Thus Keynes, for example, dismissed the need for overt “socialization”, arguing that the nationalization of industries like the railways was unnecessary because “the battle of socialism against unlimited private profit [was] being won in detail hour by hour” from within these large enterprises.[78] Others, however, wanted official recognition of the ways in which the growth in pure *rentier* share ownership had further blurred the lines between debt and property and between credit and capital, advocating the re-classification of shareholders as creditors (outsiders) who were “owed” but did not “own”. In his final book, *Absentee Ownership*, for example, Veblen openly questioned the remaining proprietary rights of shareholders. “Ownership” in the new corporate order, he argued, “no longer carrie[d] its earlier duties and responsibilities”, only certain “rights and immunities”, with the result that the classic liberal justifications for absolute property rights no longer applied. Corporate shareholders were “anonymous pensioners”, whose personal identities were irrelevant “even to the concern itself” and whose “sole effective relation to the enterprise [was] that of a fixed overhead charge on its operations”. They were the parasitic owners of rights to receive a “free income” drawn from “the… product of the underlying community” whose interests were conspiring against the full use of the ‘industrial arts’.[79]

In Britain, these sentiments found expression in the work of the Labour Party intellectuals, R H Tawney and Harold Laski. Tawney also castigated the inherently pernicious and parasitic nature of intangible financial property forms like the share[80], arguing, like Veblen, that the traditional justifications for private property rights were inapplicable to property forms of this sort which divorced gain from service, and reward from work. Unlike rights to tangible personal possessions which were “indispensable to a life of decency and comfort” and encouraged industry and initiative, these new property forms were not only “functionless” but dysfunctional, directing productive activity towards “acquisition” rather than “service to society”. They dissipated creative energy, “corrupt[ed] the principle of industry”, and distorted productive activity. To redirect industry along more productively rational and socially beneficial paths, he too proposed that shareholders be re-classified as creditors and their rights attenuated to release industry from financial domination and enable it to be reorganized in more productively functional ways. Management should to be turned into a “profession” akin to medicine and law. Harold Laski reiterated these sentiments in *A Grammar of Politics,* recommending an “alteration of the character of the owner of wealth into a

[77] See E Merrick Dodd, For whom are Corporate Managers Trustees? (1932) 45 HARVARD LAW REVIEW 1147.
[78] KEYNES, supra note 75.
[79] VEBLEN, supra note 67, 97–8, 105, 163-4
[80] R H TAWNEY, THE ACQUISITIVE SOCIETY (1920).

person to whom a fixed dividend is paid" to enable production to be "infused … with the sense of responsibility it now lacks".[81]

Despite his disagreements with Dodd, Berle too recognized the changed nature of corporate shareholding. In the final section of *The Modern Corporation and Private Property* Berle and Means argued that the modern corporation had "dissolved the [private] property atom" in which possession and control were united, and undermined the applicability of the "traditional logic" of profit and property. Corporations now involved two forms of property: one *active*, the tangible assets owned by the corporation and controlled by the managers; the other *passive*, the intangible revenue rights, "liquid, impersonal, and involving no responsibility", owned by the shareholders. Reduced to a "mere recipient of the wages of capital", the modern corporate shareholder now resembled "the bondholder or lender of money". It followed that it was no longer appropriate to view shareholders as the "owners" of the corporation. The "corporate revolution", they therefore concluded, had raised "legal, economic and social questions" of considerable importance, the "greatest" of which was "in whose interests should the great quasi-public corporations … be operated?" In the final chapter they outlined some possible answers, one of which involved developing an alternative conception of the corporation as a social institution. In becoming functionless *rentiers,* they argued, shareholders had "surrendered the right that the corporation should be operated in their sole interest" and "released the community from the obligation to protect them to the full extent implied in the doctrine of strict property rights". The community was now entitled "to demand that the modern corporation serve ... all society" and that various groups be "assign[ed] ... a portion of the income stream on the basis of public policy rather than private cupidity"; shareholders should get only "a fair return" on their capital.[82]

Socialization in the Ascendancy: The Rise of Managerialism

The decline in financial power did not prevent belief in the existence of an industry-dominating "money trust" persisting into the 1930s.[83] By the outbreak of the Second World War, however, it was clear that the direct domination of industrial capital by finance, which some had seen as a more or less permanent state of affairs, had, for the time being at least, waned. Indeed, in the decades after the War, the idea that ownership and control had been separated took hold and became the basis of "managerialist" theories not only of the corporation but of capitalism as a whole. Many thought that the rise of monopoly and oligopoly and replacement of market co-ordination by planning, the weakening of high finance, disempowerment of *rentier*

[81] HAROLD LASKI, A GRAMMAR OF POLITICS (1925), 201–9.
[82] ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932), Book IV, chapter IV. A few years later, Joseph Schumoeter argued that with what he called the "evaporation of the substance of property" and the handing over of management power to professional managers, "the modern corporation, although the product of the capitalist process, socializes the bourgeois mind", "relentlessly narrow[ing] the scope of capitalist motivation": CAPITALISM, SOCIALISM AND DEMOCRACY (1943), 156.
[83] See, for example, WILLIAM DOUGLAS, DEMOCRACY AND FINANCE (1940).

shareholders, rise of professional managers, and, crucially, growing strength of organized labour was leading to more “socialized” corporations. Within a few years, some commentators were arguing that corporate management “no longer [saw itself as] the agent of proprietorship seeking to maximize return on investment”, but as “responsible to stockholders, employees, customers, the general public, and, perhaps, most important, the firm itself as an institution”.[84] By the 1960's, it had become common, even in Britain, for the representatives of business “to declare that industry owes duties to employees, consumers and the nation as well as to shareholders”.[85] In practice, if not in law, the corporate interest was becoming less closely identified with the shareholder interest, and corporate power, it seemed, was being exercised in a more socially sensitive and responsible manner.

The claims of the managerialists did not go unchallenged, however. Broadly speaking, two different critiques emerged. The first accepted the decline in shareholder power but argued that managers were exercising their new found power and discretion in a self-interested way: the managerialism that had emerged was selfish and “sectional” rather than socialized and “non-sectional”.[86] The second denied the loss of financial control, arguing that the level of shareholding required for effective strategic control by minorities was lower than often thought, and that control by minority financial interests was widespread: the dispersal of shareholdings had actually made it possible for minority interests, using intercorporate relations, interlocking directorships and the like, to wield disproportionate power.[87] This led to attempts to distinguish “legal” or “nominal” ownership (which was dispersed) from “control” and “effective” ownership (which was concentrated).[88]

The empirical research undertaken during this period, although yielding different results and conclusions, suggested that some of the more extreme claims of managerial autonomy were unsustainable. It is hard to deny, however, that corporate practices and behavior—and the social outcomes they generated—had changed. In general terms, and riding roughshod over the undoubted jurisdictional differences, Edward Herman probably got it about right when he argued that “management control” was a reality, but was “constrained”.[89] Although one must be careful not to overstate, therefore, there is clear evidence that during this period corporate governance *was* more “socialized” than before or since. Indeed, it is not coincidental that the decline in shareholder power and more socialized corporate governance that marked the

[84] Carl Kaysen, The Social Significance of the Modern Corporation, 47 AMERICAN ECONOMIC REVIEW (1957), 313-4.
[85] Gower, supra Note 53, 578.
[86] See THEO NICHOLS, OWNERSHIP, CONTROL AND IDEOLOGY (1969).
[87] For a discussion of the literature, see LORRAINE TALBOT, CRITICAL COMPANY LAW (2008), 139-145.
[88] Though there was little agreement about the proportion of shares needed to generate “control”: See SCOTT, supra note 62, 23, 30, 42-55. Strategic control was distinguished from operational control. On this, see Charles Bettelheim’s models of ownership: BETTELHEIM, ECONOMIC CALCULATION AND FORMS OF PROPERTY (1976).
[89] EDWARD HERMAN, CORPORATE CONTROL, CORPORATE POWER (1981).

"managerialist" era corresponded with a period in which the labour and trade union movements were relatively strong, and in which social democracy, the welfare state, and Keynesianism were enjoying their heyday. This was the 50 year or so period identified by Piketty and others as one in which income and wealth inequality narrowed. Nor is it insignificant that this was a period in which the existence of the corporation as legal persons radically separate from their shareholders was taken increasingly seriously—and not just for liability purposes. During this period the corporate interest really did come widely to be seen as something rather different from the interests of shareholders.

Some continued to seek alterations to corporate structures, advocating the formal relegation of shareholders to the status of preferred creditors and dispersal of control rights among different groups such as employees.[90] In light of what seemed like the gradual triumph of "socialization" in practice, however, others argued that as shareholders had been *de facto* disempowered there was no need for politically provocative nationalizations or attenuations of shareholder rights. They simply weren't necessary. Socialization, it was believed, could be achieved without radical changes to the corporate legal form. Managers simply needed to be educated to act in a socially responsible manner. Indeed, many believed that a more socialized capitalism—what Berle called a "people's capitalism"—was emerging. Some went still further, arguing that we were moving towards a post-capitalist society.[91]

"Organised Money" and the Re-Privatization of the Corporation[92]

As it turned out, they were mistaken. Although the key elements of the corporate legal form changed relatively little[93], the decades since World War II saw the bundle of rights possessed by shareholders (and financial property owners in general) enhanced by, inter alia, the relaxation of the rules regulating the free movement of capital, modification of the rules on take-overs, and the emergence of new forms of investor protection. Shareholder power was further augmented by the diminishing power of organized labour and re-concentration of financial property ownership in institutions which themselves have a vested financial interest in maximizing shareholder returns. The latter has enabled shareholders, acting through their institutional representatives, to make better and more effective use of their residual proprietary rights to exert power in and over corporations and their managers. Moreover, the competition between

[90] There was "no reason", argued Bill Wedderburn, "not to equate [the shareholder's] position with that of a well secured creditor"; the law should "not treat the shareholder as a 'proprietor' entitled to control": K W WEDDERBURN, COMPANY LAW REFORM (1965); See also GEORGE GOYDER, THE RESPONSIBLE COMPANY (1961).

[91] On the UK, see C A R CROSLAND, THE FUTURE OF SOCIALISM (1956); RALF DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY (1959). On the US, see HOWARD BRICK, TRANSCENDING CAPITALISM (2006).

[92] A term used by Franklin Roosevelt when announcing the Second New Deal: "We know now that Government by organized money is just as dangerous as Government by organized mob", cited in BOWMAN ET AL, WHAT A WASTE (2014)

[93] One important change in the UK was made by s168 of CA 1948 which provided directors could be removed by shareholders by simple majority vote. Previously, a 75% vote had been required.

these institutions for investment funds has grown, as has the competition within them between portfolio managers subject to regular market-based performance evaluation. At the same time new kinds of financial institution have emerged – hedge funds, private equity firms and the like - that are more interested in quick capital gains than steady long-term revenue streams.[94] The result has been not only an emphatic restoration of shareholder primacy - for managers the delivery of good shareholder returns has become an imperative - but the re-emergence of highly financialized forms of governance. Indeed, because of the mechanisms through which it operates, the exercise of financial power is more effective than it was a century ago. Today financial institutions exert power not only *directly* in individual companies but *indirectly* on the corporate sector as a whole through financial markets.[95] The power exercised by *rentiers* has, in other words, become ubiquitous. Permanently under threat, directors have been placed under severe market pressure to maximize "shareholder value", knowing that failure to meet the expectations of money managers and the growing army of security analysts renders them vulnerable to removal.

The resulting managerial focus on share price has, of course, been encouraged and reinforced by new forms of executive remuneration involving share options and other performance-related bonuses. Aimed at re-aligning the financial interests of managers with those of shareholders, these forms of remuneration have made the ruthless pursuit of short-term shareholder value highly lucrative for executives: since the 1990s their pay has sky-rocketed. These developments have also transformed the image of the ideal executive "from one of a steady, reliable caretaker of the corporation and its many constituencies to that of a swashbuckling, iconoclastic champion of shareholder value" with little interest in the fate of other corporate "stakeholders". With this the ideals of professionalism, established in American business schools in the 1920s to create "a managerial class that would run America's large corporations in a way that served the broader interests of society rather than the narrowly defined ones of capital and labor", have been swept away".[96]

Unsurprisingly, the main beneficiaries of these new forms of governance have been *rentier* shareholders. In the 1980s the share of national income accruing to financial institutions and *rentier* owners of financial property began to rise[97] as corporations abandoned earlier policies of "retain and invest" in favor of policies of "downsize and distribute".[98] In the UK, for example, there was a marked upward shift in pay-outs from

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[94] On Private Equity, see EILEEN APPLEBAUM & ROSEMARY BATT, PRIVATE EQUITY AT WORK (2014). Although focused on the US, Applebaum & Batt's account actually covers what might be called Anglo-Saxon PE. Hedge Funds often encourage share buy-backs in order to inflate share prices
[95] They also exert considerable power over states: see WOLFGANG STREECK, BUYING TIME (2014).
[96] RAKESH KHURANA, FROM HIGHER AIMS TO HIRED HANDS (2007) 3-4, 20.
[97] Gerald Epstein, Introduction, to GERALD EPSTEIN, FINANCIALIZATION AND THE WORLD (2005), 3-6; Gerard Dumenil & Dominque Levy, Costs and Benefits of Neoliberalism: A Class Analysis in EPSTEIN (ed) ibid, 23; Gerald Epstein & Arjun Jayadev, The Rise of Rentier Incomes in OECD Countries (2005), ibid, 42.
[98] William Lazonick & Mary O'Sullivan, Maximising Shareholder Value: A New Ideology for Corporate Governance, 29(1) ECONOMY AND SOCIETY (2000) 13.

13-20% in the 1980s to 20-35% in the 1990s and 2000s.[99] Further financial gains have come in the form of higher share prices, with stock-market-focused managers engaging in downsizing, outsourcing, offshoring, share buy-backs and other forms of "financial re-engineering" to reduce costs (and wages), increase dividends and push up share values. The result has been the emergence of not merely shareholder-oriented but highly financialized, short-termist forms of governance which show little concern for the long-term productive health of companies, let alone the interests of employees, communities, the environment, or society as a whole. Indeed, on occasions governance has descended into blatant looting and asset-stripping. The corporate legal form as currently constituted has made this resurgence of private power and these forms of governance possible, the residual proprietary rights attached to shares enabling the ruthless pursuit of financial gain without regard to, or any sense of responsibility for, either the long-term health of the firm of any "negative externalities". The corporation's financial performance may evidence shareholder value creation despite the fact that the firm may have destroyed value when these externalities are taken into account. Responsibility for dealing with any deleterious consequences (lost jobs, lower wages, damaged communities, growing inequality, environmental degradation, financial meltdowns and the like) has fallen on the state – states whose ability to raise taxes to deal with the fall-out of financialized governance has been undermined by the practices of those very same institutions and corporations. In recent decades, then, the governance of public corporations has been radically *de-socialized,* while the costs associated with financialized governance have been socialized. Moreover, this governance shift has not been confined to the US and the UK, and is now spreading to latecomers like Germany.[100] Indeed, in recent years the OECD's principles of corporate governance have sought to normalize and universalize an essentially Anglo-American, stock-market-based, shareholder-oriented model of the corporation.[101]

Re-Privatization: From Practice to Theory and Back to Practice

The rise of these shareholder-oriented, financialized forms of governance has, of course, been controversial. Not only is there little evidence that they have made a positive contribution to investment or productive efficiency, they have been implicated in a string of corporate scandals and collapses as well as in rising inequality. Indeed, since the great financial crash even some erstwhile champions of "shareholder value" have questioned it as a goal.[102] Despite this, new narratives have been developed justifying and, indeed, commending the reassertion of shareholder primacy. In other words, the re-privatization of the corporation and corporate surpluses in practice has been accompanied by attempts to re-privatize the corporation in theory.

[99] JULIE FROUD ET AL, FINANCIALIZATION AND STRATEGY (2006), 68, 87-88.
[100] See WOLFGANG STREECK, RE-FORMING CAPITALISM (2009).
[101] See SUSANNE SOEDERBERG, POLITICS OF THE NEW FINANCIAL ARCHITECTURE (2004)
[102] Like Jack Welch, former CEO of General Electric, who famously declared shareholder value maximization to be a "dumb idea".

The traditional justifications for shareholder primacy, of course, centre on the idea that corporations are "owned" by their shareholders and should, therefore, be run in the shareholder interest as a simple matter of private property right. In recent decades, however, the academic supporters of shareholder primacy have downplayed the "ownership" claims of shareholders, in recognition perhaps of their weakness[103], and developed alternative, consequentialist justifications which centre on the claim that that shareholder primacy benefits society as a whole. This claim is rooted in the belief that despite the oligopolistic nature of many product markets and seemingly non-market nature of firms, the rise of increasingly open, global financial markets and emergence of a so-called "market for corporate control" has subjected corporations and corporate managers to market disciplines which, theoretically at least, place them back under the market.

Indeed, as noted earlier, some have argued that globalization has brought different models of the corporation into competition with one another and the Anglo-American, shareholder-oriented, stock-market-based model is outcompeting its less shareholder-oriented rivals.[104] Others have gone still further. The so-called "nexus-of-contracts" theories of the corporation which began to emerge in the 1970s assert that existing (Anglo-American) corporate structures are themselves the products of private contracts. It follows that they are market-derived and, as such, *a priori*, "efficient".[105] Empirically, these theories are implausible – the theorists involved have to engage in life-threatening contortions to discover the required corporate "contracts" – but ideologically they do the trick.[106] They dissolve the corporation out of existence, rendering corporate arrangements the alleged products of a series of atomised individual contracts and removing the the need to resort to claims about shareholder corporate "ownership": the corporation is a mere "legal fiction", a matter of "convenience rather than reality", and no longer exists as an entity capable of being "owned".[107] With the corporation out of the way, shareholders are reconnected both to the corporate assets and to directors, rendering corporate governance a simple "agency problem": how do you get director-agents to act in the interests of their shareholder-principals? Having defined corporations out of existence, these theories also, of course, preclude consideration of their possible socialization. "An approach that emphasizes the contractual nature of

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103 IRELAND, supra note 43.
104 HANSMAN & KRAAKMANN, supra note 6.
105 Once it has been presumed that a governance structure is the product of contracting, "it follows that it must be efficient": J E Parkinson, The Contractual Theory of the Company and the Protection of Non-Shareholder Interests, in DAVID FELDMAN & FRANK MIESEL (eds) CORPORATE AND COMMERICAL LAW: MODERN DEVELOPMENTS (1996), 121 at 125.
106 See Paddy Ireland, 'Recontractualising the Corporation: Implicit Contract as Ideology', in DAVID CAMPBELL, HUGH COLLINS & JOHN WIGHTMAN (EDS) IMPLICIT DIMENSIONS OF CONTRACT (2003), 255-288
107 However, when defending limited liability - which they describe as "perhaps *the* distinguishing feature of corporate law"- they are compelled to resurrect the corporate entity. "Corporations', they tell us, "do not have limited liability; they must pay all of their debts, just as anyone else must": EASTERBROOK & FISCHEL, supra note 5, 12, 40.

the corporation", the leading contractual theorists Easterbrook and Fischel argue, "removes from the field of interesting questions one that plagued many writers: what is the goal of the corporation? Is it profit, and for whom? Social welfare more broadly defined? Is there anything wrong with corporate charity? Should corporations try to maximise profit over the long-run of the short-run? Our response to such questions is: who cares?"[108]

By implicitly denying any necessary role for the state (and the *public*) in constructing corporate arrangements[109] and by asserting the latter's tendential efficiency, this marketized account of corporate structures not only serves to justify and legitimate the retention by shareholders of their residual income and exclusive control rights, it casts doubt on the wisdom of state interventions in corporate affairs. The result of these re-theorizations is an approach to corporate governance which is hostile to public regulation and supportive of (and increasingly reliant on) voluntarism and private authority and regulation at both the national and international levels. This is reflected in the emergence and development of corporate governance principles and codes by private market actors both within specific jurisdictions and with international organizations. They have been issued by stock exchanges, corporations themselves, institutional investors, associations of directors and by international organizations, all with the support of governments.[110]

The advocates of shareholder primacy have made further empirical claims in support of this re-privatization of the corporation. With the growth of private pensions, they argue, financial property ownership has been "democratized" so that more and more people *directly* benefit from the maximization of shareholder value: we're all (more or less) shareholders now. The empirical findings of Piketty and other researchers, however, make it clear that despite the spread of financial property ownership, financial wealth remains very heavily concentrated amongst the wealthy and has become even more so in recent decades. Piketty, for example, shows that the concentration of capital and wealth ownership amongst both the top 10% and the top 1% of the population has risen significantly since the 1970s and 80s. In the US the share of the top 10% rose from just over 60% to 72%, and the share of the top 1% from just below 30% to just over 35%. During the same period in the UK the wealth share of the top 10% rose from just over 60% to 70%, and the share of the top 1% from just over 20% to just under 30%. Edward Wolff paints a broadly similar picture in his analysis of the US Federal Reserve's triennial Survey of Consumer Finances (SCF), concluding that "in terms of wealth or income, substantial stock holdings have still not penetrated much beyond the reach of the rich and the upper middle class".[111]

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[108] EASTERBROOK & FISCHEL, supra note 5, 35-36.

[109] The state simply short-circuits the process by providing a set of default which provide more or less what private contracting parties would have negotiated, but which they can vary.

[110] Compliance with these codes and principles is not usually mandated by law, though some of them, like those linked to stock exchange listing requirements, have coercive effects.

[111] Edward N Wolff, 'The Asset Price Meltdown and the Wealth of the Middle Class', 26/8/12: http://www.colorado.edu/AmStudies/lewis/1025/incomestudy2012.pdf. Wolff's analysis also suggests

The findings of the 2013 Survey suggest that these trends have continued.[112] The main beneficiaries of the re-privatization of the corporation have, then, been this elite group of *rentiers*, together with the executive class, and a range of financial intermediaries and functionaries who have benefitted from a financialized "economy of permanent restructuring"[113] and from their role as the "agents of wealth defense" - the army of well-paid skilled professionals (lawyers, accountants and the like) who work to protect the property and incomes of the wealthy.[114] Indeed, the rise of the shareholder value corporation has not only contributed to the growth in income and wealth inequality but welded these groups into a "new aristocracy of finance".[115]

Investor Protection and the Public Foundations of Private Power

Nowhere has the growing economic and political power of this new financial oligarchy been clearer than in the prioritization of "investor protection" as a policy goal. Paradoxically, in a neoliberal world of increasingly globalized financial markets the achievement of this goal – including securing the continued *private* appropriation of corporate surpluses – is demanding ever more extensive *public* interventions. This is because of the very nature of financial property.

As we have seen, extensive legal interventions were needed to constitute intangible property forms like shares as separate objects of property. This is because financial property is intangible: there is no tangible "thing" to which the property rights directly relate. The very object of property is a legal construct. This is most obvious with government bonds, but it is also true of JSC shares which no longer confer any direct proprietary interest in a company's assets while the company is a going concern. Financial property is composed of rights to receive income streams - dividends, interest payments and the like. Crucially, extensive legal (and other) interventions are also needed to preserve the integrity of property of this sort, whose value is derived from *expectations* about the returns that will accrue to it *in the future*. Assessing the value of shares in particular inevitably involves some degree of speculation, for the returns to them are not specified in advance. Moreover, as we know only too well, expectations about future returns can be manipulated. Protecting the integrity of financial property thus requires a wide range of legal and other interventions to try to eliminate deceit and swindling, and to ensure that its market value reflects with

that the concentration of ownership of "financial securities" is even greater than the concentration of stock ownership, with the wealthiest 1% accounting for 64%.

[112] Jesse Bricker *et al*., "Changes in US Family Finances from 2010 to 2013: Evidence from the Survey of Consumer Finances", 100 FEDERAL RESERVE BULLETIN, September 2014.

[113] Peter Folkman, Julie Froud, Sukhdev Jophal and Karel Williams, Working for Themselves?: Capital Market Intermediaries and Present Day Capitalism, 49 BUSINESS HISTORY (2007) 552, pointing how a diverse bunch of financial intermediaries (corporate advisors and service-providers, securities analysts, hedge fund operators, private equity firms, city lawyers, and the like) have also reaped significant financial benefits.

[114] See Jeffrey A Winters, Wealth Defense and the Limits of Liberal Democracy: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2452419

[115] See Paddy Ireland, The Corporation and the New Aristocracy of Finance, in JEAN-PHILIPPE ROBE, ANTOINE LYON-CAEN & STEPHANE VERNAC (eds), MULTINATIONALS AND THE CONSTITUTIONALIZATION OF THE WORLD-POWER SYSTEM (2016)

reasonable accuracy its future income-generating potential. This is reflected in the many and varied sources of the rules protecting investors found in company, security, bankruptcy, takeover and competition laws, as well as in stock exchange regulations and accounting standards.

The vulnerability of intangible financial property extends beyond this, however. Because its value is derived from anticipated future revenues, financial property is potentially affected by any changes in the social processes through which the income streams are generated. The returns accruing to shares, for example, are potentially affected by everything from changes in labor and corporate laws to changes in health and safety regulations and trade and taxation policies; from changes in the balance of political and class power to changes in general economic conditions as well as in particular markets. Protecting their integrity and, indeed, that of financial property in general therefore requires measures aimed at creating and/or preserving the social conditions and practices responsible for ensuring a continuing flow of returns. In an era in which *rentier* investment has become an increasingly global affair, this is tricky, not least because there has emerged a growing conflict of interest between what Wolfgang Streeck has called the *Staatsvolk* – the general citizenry rooted in specific societies and voting in elections - and the *Marktvolk* – the footloose owners of liquid financial property operating in increasingly globalized financial markets and voting with their money. There is always a risk that the *Staatsvolk,* will make demands - like higher wages, improved labor and environmental standards, enhanced levels of social spending and so on - that threaten the interests of the *Marktvolk*, whose wealth and power depends (ironically) on the infrastructure provided by the state and taxes of the *Staatsvolk*..[116] How have the *Marktvolk* dealt with these threats?

In recent decades, the growing power of the *Marktvolk* has been reflected in the development of new techniques to protect investors from the political threats posed by democracy. An ensemble of rules aimed at offering quasi-constitutional protection to foreign investments have emerged. Actively promoted and developed by the leading OECD countries, this new "investment rules regime" is most clearly evident in the gradual emergence of a complex, transnational network of rules for the protection of foreign direct investment, embodied in a variety of legally binding agreements. The goal is to restrict the ability of states to adopt policies that threaten to diminish investors' anticipated future returns without compensation by locking them into a "rule of investment law" which protects state action that might impair their investment interests.[117] The rules constituting the regime are negotiated away from the public gaze by technocrats, often amidst intense corporate lobbying. One of the most important aspects to this regime is the way in which it seeks to compel states to provide compensation not only for the outright

[116] STREECK, supra note 100.

[117] See DAVID SCHNEIDERMANN, CONSTITUTIONALIZING ECONOMIC GLOBALIZATION (2008), 26; David Schneiderman, Investing in Democracy? Political Process and International Investment Law, 60 UNIVERSITY OF TORONTO LAW JOURNAL (2010), 909; David Schneiderman, Investment Rules and the New Constitutionalism, 25 LAW AND SOCIAL INQUIRY (2000), 757 at 772

physical expropriation (nationalization) of property but for the adoption of policies which have the effect of reducing the revenues likely to accrue in the future. So-called "regulatory takings" of this sort are regarded as tantamount to expropriation and widely seen as the most important part of the regime because of the restrictions they place on state policy. With third-party investors increasingly having standing to sue in domestic courts and international arbitration tribunals, states are now constrained not only by fears of capital flight but by the threat of litigation arising out of economic and social policies that negatively impact on future revenues. Since 2000, hundreds of foreign investors have sued states on this basis.[118]

It is because of the extensive protections offered by this body of rules to property interests – and thus to private power - and its constraining effects on government policies that it has come to be described as representing a "new constitutionalism". The aim is to establish rules which protect foreign investments and then to freeze them.[119] In this way, states are bound into the future, "whatever political combinations develop at home to counteract it". The "new constitutionalism" thus seeks to restrict the range of political possibility and insulate key aspects of economic life from democracy. The "states of advanced capitalism have to be constructed in such a way", writes Streeck, "that they earn the enduring trust of the owners and movers of capital, by giving credible guarantees at the level of policy and institutions that they will not intervene in 'the economy'—or that, if they do, it will only be to protect and enforce market justice in the shape of suitable returns on capital investments. A precondition of this is the neutralization of democracy …"[120] In other areas, of course, this de-democratization has taken the form of the transfer of economic policy-making to "independent", technocratic institutions such as central banks, international organizations (like the IMF) and summit meetings (like the European Council).

Re-Politicizing Corporate Governance

The legal form of the business corporation was constructed in the nineteenth century to facilitate the formation and operation of JSCs and to accommodate and protect the *rentier* investors that populated them. Originally, the "public" dimensions of corporate status and privileges – and, therefore, of incorporated JSCs - were clearly visible. In the early nineteenth century, writes James Taylor, "while it was recognized that corporations sanctioned by the state for public purposes should possess [legal] privileges, the idea that businessmen should have free access to these privileges for

[118] These arrangements look likely soon to be joined by the controversial Transatlantic Trade and Investment Partnership (TTIP) currently being negotiated between the European Commission and the US government. TTIP, which seeks to eliminate the so-called "non-tariff barriers to trade" (most tariff barriers having already been negotiated away), would extend the regime still further, as the concept of "non-tariff barriers to trade" potentially encompasses everything from food standards to labor rights, and from safety regulations to environmental protection.

[119] The phrase was coined by Stephen Gill. See, for example: New Constitutionalism, Democratisation and Global Political Economy, 10 PACIFICA REVIEW (1998), 23.

[120] STREECK, *supra* n 100, 62.

private purposes seemed absurd to many commentators”.[121] But with the enactment of general incorporation statutes, access to these privileges became a matter of private right and the public aspects of corporate legal status became increasingly invisible. The rise to dominance of the joint stock corporation in the late nineteenth and twentieth centuries, however, marked the increasingly inter-connected and social nature of production under capitalism. It also radically changed the character of the dominant forms of capitalist property and, as history has shown, foreshadowed very different possible futures. Corporations and corporate governance have at different times and in different jurisdictions taken very different directions – directions determined less by economic and technological imperatives and more by economic and political power. Thus the radical re-privatization of the corporation which has taken place in recent decades has been underpinned by the declining power of labour and growing power of capital, particularly in its financial forms. Re-concentrated in financial institutions, corporate shareholders and their representatives have been able (and willing) to use their residual proprietary rights to shape corporate behaviour. They have also managed to entrench an ideology which supports shareholder primacy and the continued private appropriation of corporate surpluses. Given the inherently financial (and *rentier*) nature of shareholding in joint stock corporations, we should hardly be surprised that the result has been increasingly financialized forms of governance which are productively and socially dysfunctional. Nor should we be surprised that those who benefit from shareholder primacy continue to assert both the economic superiority of shareholder-orientated firms and the fundamentally *private* nature of these corporations and of production more generally – notwithstanding their obvious public and social dimensions, and the ever-growing dependence of *rentier* shareholders on state (public) interventions to protect their interests. What is surprising is that policy makers, in the teeth of the evidence, continue to seek solutions to the governance problems we so clearly face by encouraging business self-regulation and by further empowering shareholders.[122]

The re-privatization of the public, joint stock corporation effected by the rise of impersonal, global financial markets is deeply paradoxical, for production has never been more international, social, and planned. A large proportion of international trade is now co-ordinated not by “the market” but by multi-national enterprises: it is trade *internal* to enterprises which takes place outside the market.[123] Market mechanisms and disciplines are used selectively by capital to exert downward pressure on wages, taxes, labour and environmental standards and social provision, and to extract from governments policies congenial to the continuing private extraction of wealth. Indeed,

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[121] TAYLOR, supra note 10, 12.
[122] Jean-Phillipe Robe, ‘The Shareholder Rights Directive II: The Wrong Cure for a Deadly Disease’
[123] Contracts are made between the various subsidiaries making up an enterprise and although, legally speaking, they involve distinct legal entities, in reality it is the same economic enterprise which is at both ends of the transaction. The prices paid, interest rates levied, and royalties agreed are governed not by market mechanisms and competitive negotiations between autonomous market participants, but by the enterprise itself. In other words, they are organized, planned and administered.

private appropriation on the current scale seems not only to require ever more public interventions (at the national and international levels) but to be incompatible with democracy. It might also prove to be self-undermining, threatening the very social conditions that make profit-making possible. The contradiction between ever more socialized and globalized production and continuing private appropriation has never been more acute. In this context, it is perhaps worth reminding ourselves of the way in which the US Supreme Court defined a “security” for the purposes of federal securities law. A financial instrument is a security, they held, if it “involves an investment of money in a common enterprise with profits to come *solely from the efforts of others”.*[124]

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[124] 328 U.S. 293, per Murphy J. The case still represents the leading attempt by the US Supreme Court to define the nature of a security and was affirmed in *United Housing Foundation Inc. v Forman*, 421 U.S. 837 (1975), and in *Landreth Timber Co v Landreth*, 471 U.S. 681 (1985).